

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEBBIE VASQUEZ)	
Claimant)	
)	
VS.)	
)	
WAGGONERS, INC.)	
Respondent)	Docket No. 1,039,066
)	
AND)	
)	
TWIN CITY FIRE INSURANCE CO.)	
Insurance Carrier)	

ORDER

Claimant requests review of the July 12, 2010 Award by Administrative Law Judge Bruce E. Moore (ALJ). The Board heard oral argument on October 6, 2010.¹

APPEARANCES

Mitchell W. Rice of Hutchinson, Kansas, appeared for the claimant. Anemarie D. Mura of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties agreed that in the event that the Award is modified to include a permanent impairment to the back, claimant is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a), of 79.5 percent based upon a 100 percent wage loss and a 59 percent task loss.

¹ Due to the unexpected retirement of Carol Foreman, Gary Terrill, of Overland Park, Kansas, was appointed to serve as a pro tem in this matter. Mr. Terrill participated in the oral arguments.

ISSUES

The ALJ found claimant sustained a 7 percent (combined) scheduled injury to her right upper extremity for her right carpal tunnel complaints and her right epicondylitis. The ALJ specifically found that claimant failed to sustain her burden of showing she sustained permanent impairment to her back and was therefore limited in her recovery to that provided by the schedule of injuries contained in K.S.A. 44-510d.

Claimant requests review of this decision alleging that contrary to the ALJ's findings, the greater weight of the evidence supports her contention that she sustained permanent impairment to her mid and lower back as a result of her repetitive work activities as evidenced by the testimony of Dr. Munhall. Accordingly, claimant asks the Board to reverse the ALJ's conclusions on that issue and enter an award granting her a permanent partial general (work) disability of 79.5 percent. Alternatively, claimant argues that the ALJ should have awarded her a 12 percent permanent (combined) impairment to the right upper extremity, a finding that takes into account the uncontroverted evidence of a 10 percent permanent impairment for her carpal tunnel complaints and 2 percent to her elbow for the lateral epicondylitis complaints and resulting surgery.

Respondent contends the ALJ's Award should be affirmed in every respect.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

As noted by the parties, there is no dispute that claimant suffered a series of injuries as a result of her work activities which culminated in an accident on February 29, 2008. The sole issue in this appeal is the nature and extent of claimant's impairment. The ALJ found that claimant had sustained injury to her right wrist (from carpal tunnel complaints²) and right elbow (epicondylitis surgery) which when combined, yielded a 7 percent permanent impairment to the right upper extremity (at the 210 week level). The ALJ denied her request for a whole body impairment (for her mid and low back complaints) as he concluded, based primarily upon the opinions expressed by Dr. Paul Stein, the independent medical examiner, that claimant failed to establish any permanency in her mid to lower back. Specifically, the ALJ noted that:

² The Award indicates the ALJ presumed that Dr. Goin had assigned a 0 percent for the carpal tunnel condition (inasmuch as his testimony indicates he did not rate that condition). The ALJ then averaged this 0 percent with Dr. Munhall's 10 percent impairment to the upper extremity. This yields a 5 percent and when combined with the 2 percent to the elbow, yields the 7 percent assigned by the ALJ.

. . . After taking a history, reviewing [c]laimant's treatment records, and conducting an examination, Dr. Stein diagnosed [c]laimant as suffering from "chronic lumbar strain without evidence of radiculopathy. [footnote omitted] He recommended an MRI and flexion-extension x-rays. Those tests were performed, and Dr. Stein supplemented his report on June 18, 2009. In his supplemental report, Dr. Stein opined that [c]laimant's back exhibited "minimal degenerative changes which are not considered clinically significant." Dr. Stein recommended no further testing or treatment, and opined that [c]laimant did not qualify for a permanent impairment rating under the **Guides**. He found no "structural pathology that requires specific medical restrictions on a permanent basis."³

The Board has reviewed the record in its entirety as well as the parties oral and written arguments and concludes the ALJ's Award should be affirmed in part and modified in part.

As for claimant's claim that she sustained a mid and low back injury, the Board remains unpersuaded that she has established that it is more likely than not that she bears a permanent impairment as a result of her work activities. While it is true that Dr. Scott Goin admittedly⁴ did not focus on whatever back complaints claimant might have made while he was treating her elbow condition, she had an opportunity to fully and completely voice her complaints to Dr. Stein, the independent medical examiner. Dr. Stein not only examined her, but recommended additional diagnostic tests. And at the conclusion of that process, he determined that she did not have a permanent impairment. And while Dr. Michael Munhall expressed an opinion to the contrary, the Board believes the greater weight of the evidence supports the ALJ's finding on this issue. Accordingly, the claimant is not entitled to a functional impairment rating to the whole body, and is likewise, not entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a).

Turning now to the remaining issue of the nature and extent of claimant's scheduled injury, the Board must address not only the percentage of impairment, if any, to both the wrist and the elbow, but must also consider whether, in light of recent precedent, the ALJ's decision to combine the impairments to the wrist and the elbow was correct.

As noted earlier, Dr. Goin rated claimant's elbow impairment at 2 percent, as did Dr. Munhall. Thus, the Board can easily conclude that claimant's permanent impairment to her right elbow is 2 percent. The more difficult decision is whether and to what extent claimant is entitled to permanency for her right carpal tunnel condition.

The record is clear that claimant underwent testing which, according to Drs. Munhall and Dr. Stein, confirmed the presence of carpal tunnel in claimant's right wrist. Although

³ ALJ Award (July 12, 2010) at 4.

⁴ Goin Depo. at 8-9.

Dr. Stein did not rate this condition, that is understandable as he was appointed to conduct an independent medical examination for complaints relative to claimant's back, not her right wrist. And Dr. Goin did not seem to focus on anything other than claimant's elbow complaints. Thus, the ALJ's decision to assume that Dr. Goin's failure to rate the carpal tunnel complaints constituted a 0 percent impairment rating is not reasonable. The evidence in this record supports claimant's contention that she does, in fact, have right carpal tunnel complaints and the only physician to rate that condition is Dr. Munhall, who assigned a 10 percent. The Board finds that the Award should be modified to reflect this 10 percent impairment.

At oral argument the parties acknowledged recent precedent⁵ which resolved a looming issue about how multiple injuries to the same extremity should be calculated. Under the principles set forth in *Redd*, the Board concludes that claimant's 2 percent to the elbow and the 10 percent to the right forearm are to be separately calculated. And although the parties did not specifically address this (due to the recency of the Supreme Court's decision) it is reasonable to conclude based on this record that the temporary total disability benefits which were paid in this matter are to be deducted from the lump sum due as a result of the 2 percent impairment assigned to the elbow. Both parties acknowledged that claimant had never received any other treatment for her back or her carpal tunnel complaints and thus, had never been taken off work for those conditions. She had, however, been off work for 15.20 weeks following surgery on her elbow and therefore, all indemnity payments made during that period should be deducted from the award made on the elbow and not from the separately calculated injury to the forearm.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated July 12, 2010, is affirmed in part and modified as follows:

Injury #1

The claimant is entitled to 20.00 weeks of permanent partial disability compensation, at the rate of \$225.82 per week, in the amount of \$4,516.40 for a 10 percent loss of use of the forearm, making a total award of \$4,516.40.

Injury #2

The claimant is entitled to 15.29 weeks of temporary total disability compensation at the rate of \$225.82 per week in the amount of \$3,452.79 followed by 3.89 weeks of permanent partial disability compensation, at the rate of \$225.82 per week, in the amount of \$878.44 for a 2 percent loss of use of the arm, making a total award of \$4,331.23.

⁵ *Redd v. Kansas Truck Center*, ____ Kan.____, 239 P.3d 66 (2010).

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of November 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Anemarie D. Mura, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge